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 11

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION

15 IN RE: PERSONAL WEB TECHNOLOGIES,
 LLC ET AL., PATENT LITIGATION

16 AMAZON.COM, INC., and AMAZON WEB
 17 SERVICES, INC.,

18 Plaintiffs

19 v.

PERSONALWEB TECHNOLOGIES, LLC and
 20 LEVEL 3 COMMUNICATIONS, LLC,

21 Defendants,

22 PERSONALWEB TECHNOLOGIES, LLC, and
 LEVEL 3 COMMUNICATIONS, LLC,

23 Plaintiffs,

24 v.

25 TWITCH INTERACTIVE, INC.,

26 Defendant.
 27
 28

Case No.: 5:18-md-02834-BLF

Case No.: 5:18-cv-00767-BLF

Case No.: 5:18-cv-05619-BLF

**REQUEST OF AMAZON.COM, INC.,
 AMAZON WEB SERVICES, INC., AND
 TWITCH INTERACTIVE, INC. FOR
 CASE MANAGEMENT CONFERENCE**

1 Amazon.com, Inc., Amazon Web Services, Inc., and Twitch Interactive, Inc. (collectively,
2 “Amazon”) respectfully request that the Court hold a case management conference as soon as
3 practical at the Court’s convenience to confirm both that it retains jurisdiction over this case and its
4 judgment and that PersonalWeb Technologies, LLC (“PersonalWeb”) must comply with valid post-
5 judgment discovery orders of the Court. The Court has twice ordered PersonalWeb to provide
6 documents and information about its finances. PersonalWeb has done nothing to comply but make
7 a small document production (collected without meaningful supervision by its counsel of record)
8 and provide interrogatory responses that assert objections the Court already deemed waived and
9 incorporate the entire document production by reference. Mere hours after committing in writing
10 to taking additional steps to comply, Jeffrey Gersh, PersonalWeb’s counsel at Stubbs Alderton &
11 Markiles LLP (“Stubbs Alderton”) sent an email reversing course. He argued that PersonalWeb
12 need no longer comply with this Court’s orders at all because a California state court appointed a
13 receiver over PersonalWeb’s assets back in May 2021. But at the hearing on the last motion to
14 compel compliance, Mr. Gersh himself argued for PersonalWeb and raised no such objection even
15 after Amazon informed the Court of the receivership.

16 The Court previously found that “PersonalWeb appears to be thwarting Amazon’s
17 legitimate interest in collecting its judgment,” and that its manipulation of its counsel of record,
18 “along with the chameleon-like efforts of Personal Web to use this time to make itself judgment
19 proof, amount to a concerted effort to thwart collection of the judgment ordered by this Court.”
20 (Dkt. 694 at 3-4.) Those observations remain true. The receivership is fraudulent. The plaintiffs
21 in the state court action are insider-investors in PersonalWeb who in some cases share overlapping
22 membership. The receivership is based on an alleged \$19 million in loans that do not mature until
23 December 31, 2022. PersonalWeb’s investors simply demanded repayment in full as soon as the
24 Court issued the fee award in this case; immediately sought the receivership (to which PersonalWeb
25 immediately consented, submitting a declaration *on the stationery of insider-investors’ counsel*);
26 and have since used the receivership to funnel hundreds of thousands of dollars in additional
27 payments through PersonalWeb to Stubbs Alderton and appellate counsel MoloLamken LLP, to
28 continue prosecuting patent infringement lawsuits in PersonalWeb’s name and for the insider-

investors' benefit.

Amazon requests a conference to seek guidance concerning Stubbs Alderton's new round of belated objections that the Court lacks authority to enforce its judgment and PersonalWeb need not comply with past discovery orders due to the receivership.

BACKGROUND

The Court's judgment and fee award. The Court entered judgment in favor of Amazon in this case on October 28, 2020. (Dkt. 643.) On March 2, 2021, the Court awarded Amazon \$4,615,242.28 in fees and \$203,300.10 in non-taxable costs against PersonalWeb for work performed until February 2020, and on April 19, 2021, the Court awarded Amazon an additional \$571,961.71 in fees and \$11,120.97 in costs for work performed between February 2020 and February 2021. (Dkts. 648, 656.) On July 27, 2021, the Court entered an amended judgment in favor of Amazon for a total amount of \$5,403,122.68. (Dkt. 708.)

Insider investors demand repayment of purported demand instruments. The original March 2 fee order apparently prompted PersonalWeb's beneficial owners to trigger an asset protection scheme. Insider-investors Brilliant Digital Entertainment, Inc. ("BDE"), Europlay Capital Advisors, LLC ("ECA"), Claria Innovations, LLC ("Claria"), and Monto Holdings Pty Ltd ("Monto") (collectively, "Insiders") had characterized a major portion of their investment in PersonalWeb as debt: four alleged loans first issued between August 2010 and May 2012. Security agreements for the loans issued in May 2012 and March 2014 pledging "all of [PersonalWeb's] tangible and intangible assets" as collateral. All four loans were also regularly amended and restated, most recently on December 31, 2019, and did not mature until *December 31, 2022*. Even though these "loans" were less than halfway through their term (and had already been amended and restated multiple times over the course of nearly a decade), Insiders demanded repayment in full based on the amounts due as of March 31, 2021.

Insiders file the receivership action. After demanding repayment, Insiders then filed a receivership action in California state court against PersonalWeb on April 27, 2021. (Declaration of Todd R. Gregorian in Support of Request for CMC ("Gregorian Decl."), Ex. 1 [Insiders' Complaint].) All four Insiders have the same beneficial owners as PersonalWeb: Claria owned

99% of PersonalWeb and had governing authority when PersonalWeb was formed; Monto currently owns 20% of PersonalWeb; the founder of BDE was Kevin Bermeister, the Non-Executive Chairman of PersonalWeb; and the former chairman and CEO of BDE, Kevin Bermeister's cousin Mark Dyne, founded ECA. (Gregorian Decl., Ex. 2 [Amazon's Complaint-In-Intervention], at 3.) Insiders requested the appointment of a receiver and the entry of a preliminary injunction enjoining any other PersonalWeb creditors from enforcing any claim, debt, right, lien, or interest against PersonalWeb. (Gregorian Decl., Ex. 1 [Insiders' Complaint], at 15-17.) Within days, PersonalWeb, through its President, Michael Weiss, signed a declaration prepared on the stationery of Insiders' counsel conceding that PersonalWeb owed \$19 million to Insiders and could not pay, and consenting to the appointment of a receiver and the entry of a preliminary injunction. (Gregorian Decl., Ex. 3 [Weiss Decl.].) Neither the complaint nor any of Insiders' other filings before the state court disclosed the fact that Amazon is a creditor of PersonalWeb or that the ultimate beneficial owners of PersonalWeb are the same as the ultimate beneficial owners of Insiders. In other words, PersonalWeb (*i.e.*, Weiss and Bermeister) colluded with the Insiders (*i.e.*, Bermeister and family) to try to place PersonalWeb beyond the reach of this Court's judgment while it continues to pursue its business in the normal course.

Entry of preliminary injunction. On May 20, 2021, PersonalWeb and Insiders stipulated to entry of the preliminary injunction. (Gregorian Decl., Ex. 4 [Stipulated Preliminary Injunction].) On June 1, 2021, the California state court entered it. (Gregorian Decl., Ex. 5 [Preliminary Injunction Order].) The preliminary injunction establishes that the receivership will be run exclusively for Insiders' benefit (to the detriment of PersonalWeb's other creditors). It purports to prohibit any PersonalWeb creditor from enforcing claims against PersonalWeb during the receivership. But (perhaps due to a drafting error) it also *expressly carves out* the proceedings of any then-pending intellectual property actions filed by PersonalWeb, such as this case:

IT IS FURTHER ORDERED that except by leave of this Court, during the pendency of the receivership ordered herein, Defendant PersonalWeb, and all of its customers, principals, investors, collectors, stockholders, lessors, other creditors, judgment holders, and other persons seeking to establish or enforce any claim, debt, right, lien, or interest against Defendant PersonalWeb, or any of its

1 subsidiaries or affiliates, and all others acting for or on behalf of
 2 such persons, attorneys, trustees, agents, sheriffs, constables,
 3 marshals, and any other officers and their deputies, and their
 4 respective attorneys, servants, agents, and employees, be and are
 5 hereby stayed from:

6 (a) Commencing, prosecuting, continuing, or enforcing any suit,
 7 judgment, lien, levy, or proceeding against Defendant PersonalWeb,
 8 or any of its subsidiaries or affiliates, except such actions may be
 9 filed to toll any applicable statute of limitations;

10 (b) Commencing, prosecuting, continuing, or entering into any suit
 11 or proceeding in the name or on behalf of Defendant PersonalWeb,
 12 or any of their subsidiaries or affiliates, *except for any pending*
 13 *enforcement actions by Defendant PersonalWeb concerning it [sic]*
 14 *intellectual property claims;*

15 (*Id.* at 4 (emphasis added).)

16 ***Insiders continue to fund PersonalWeb intellectual property suits by funneling protected***
 17 ***payments through the receivership.*** Through the receivership, Insiders have begun “lending”
 18 PersonalWeb additional funds to pay its ongoing business expenses, including paying Stubbs
 19 Alderton and MoloLamken to continue to pursue claims against Amazon, its customers, and others
 20 such as Google and Facebook. (Gregorian Decl., Exs. 6 [Receiver’s Motion] & 7 [Order Granting
 21 Receiver’s Motion].)

22 ***This Court’s Discovery Orders.*** PersonalWeb is subject to two orders to provide post-
 23 judgment debtor discovery to Amazon. (Dkts. 664, 704.) On July 30 and August 6, 2021,
 24 PersonalWeb served interrogatory responses that improperly asserted objections that the Magistrate
 25 Judge had already ruled were waived, and (rather than provide substantive responses) simply
 26 incorporated its entire document production chosen by PersonalWeb without oversight by Stubbs
 27 Alderton. (*See, e.g.,* Gregorian Decl., Ex. 8 [Interrogatory Responses], at 1-3 (broadly
 28 incorporating PersonalWeb’s entire document production without identifying any specific Bates
 numbers); *id.*, at 4 (for Interrogatory Nos. 9 & 10, asserting the attorney/client privilege without
 providing any substantive response).) Indeed, in an e-mail exchange, Stubbs Alderton admitted
 “the docs that [Amazon] received is all [Stubbs Alderton] was provided” by PersonalWeb. (*See*
 Gregorian Decl., Ex. 9 [E-mail Exchange] at 3 (Counsel for Amazon: “When I asked you how a

1 search for responsive documents was conducted, you stated that you forwarded the requests for
 2 production to PersonalWeb and left it to your client to collect and provide you with responsive
 3 documents.”); *id.* at 2 (Mr. Gersh, Stubbs Alderton: “The docs you received is all I was
 4 provided.”).) Stubbs Alderton further represented, “We are working on assembling docs for you
 5 and I am working on getting further responses where appropriate.” (*Id.*, at 1.) Within hours, Stubbs
 6 Alderton did an about-face, asserting that the state court receivership and injunction relieves
 7 PersonalWeb of its responsibility to comply with this Court’s orders, asserting, “It seems to me that
 8 your continued action to force discovery is a violation of that injunction.” (*Id.*)

9 ***Amazon attempts to intervene in the receivership.*** On August 10, 2021, Amazon sought
 10 to intervene as a plaintiff-creditor in the state court action because it has an interest in the
 11 PersonalWeb estate and any judgment rendered in its absence prioritizing the claims of Insiders
 12 would impair Amazon’s ability to protect that interest. Insiders and PersonalWeb did not oppose
 13 the motion. But on November 17, 2021, the California state court denied it anyway, ruling that
 14 Amazon did not have “a sufficient interested [sic] in the current litigation to justify this Court
 15 granting intervention.” (Ex. 10 [Order Denying Motion to Intervene], at 5.) Consistent with the
 16 carve out in the preliminary injunction, the California state court directed that Amazon could
 17 instead take other actions to enforce its judgment against PersonalWeb, specifically by filing a lien
 18 against the proceeds of the receivership. (*Id.*, at 6.)

19 ***Stubbs Alderton’s involvement with PersonalWeb.*** SAM Venture Partners, Stubbs
 20 Alderton’s venture capital arm, is a part-owner of PersonalWeb. (*See* Case No. 5:18-cv-05619-
 21 BLF, Dkt. 3; Dkt. 611-5 (Bermeister Dep. Tr.) at 62:2-10; Dkt. 612-9.) SAM Venture Partners is
 22 seeded with money from Stubbs Alderton partners and offers legal services in exchange for equity
 23 in startup companies. (Dkt. 612-9.) Stubbs Alderton named-partner Murray Markiles is a founding
 24 director of PersonalWeb. (Gregorian Decl., Ex. 11 [Operating Agreement], at 13.) On information
 25 and belief, these parties helped create the ownership structure that kept PersonalWeb
 26 undercapitalized and has now made it judgment-proof. They also knowingly continue to receive
 27 the direct benefit of the asset protection scheme, using it to funnel additional payments to Stubbs
 28 Alderton and to continue pursuing speculative and wasteful patent litigation in which SAM Venture

Partners has a financial interest.

ARGUMENT

Amazon requests that this Court provide guidance as to whether the state court receivership action deprived it of jurisdiction or otherwise voided its pre-existing discovery orders. While the Supremacy Clause of the Constitution makes this seem an almost laughable question, PersonalWeb’s counsel has forced the issue—staying silent about the receivership until after the Court confirmed that PersonalWeb must comply, and then attempting to raise a belated objection to excuse PersonalWeb’s continued flouting of the Court’s orders.

This Court entered judgment in favor of Amazon and ordered PersonalWeb to pay approximately \$5.4 million in attorney fees and costs. The Supreme Court has long held that a court retains jurisdiction to enforce its judgments:

[T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. . . . Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.

Riggs v. Johnson Cty., 73 U.S. 166, 187 (1868). Courts in this district have likewise held that “a district court has the inherent power to enforce its orders.” *Nikko Materials USA, Inc. v. R.E. Serv. Co.*, No. 03-cv-02549 SBA, 2006 WL 1749550, at *2 (N.D. Cal. June 22, 2006); *see also Spallone v. United States*, 493 U.S. 265, 276 (1990). This power is derived “from the implied powers ‘necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases.’” *Nikko*, 2006 WL 1749550, at *2 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)). Thus, this Court retains jurisdiction to enforce its judgment against PersonalWeb and its discovery orders remain in full effect.

PersonalWeb waived any objection based on the state court receivership and preliminary injunction. The Court originally compelled the discovery at issue on April 27, 2021. The Magistrate Judge has already heard a dispute about whether PersonalWeb had to comply with the Court’s order and has already ruled that PersonalWeb waived its objections and must provide the discovery. (Dkt. 704); *see* Fed. R. Civ. P. 33(b)(4); *Richmark Corp. v. Timber Falling Consultants*,

1 959 F.2d 1468, 1473 (9th Cir. 1992); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981).

2 PersonalWeb and Stubbs Alderton had multiple opportunities since the Spring of 2021 to
3 raise the state court proceeding as a defense before this Court, and they instead chose to sit on their
4 hands and conceal the details of the pending scheme from the Court. When the parties appeared
5 before the Magistrate Judge months later, on July 20, 2021, Amazon out of an abundance of caution
6 informed the Court of the pending receivership action. (*See* Dkt. 707 at 5:12-17.) Mr. Gersh on
7 behalf of PersonalWeb elected not to assert any objection based on it. (*See id.* at 7:19-8:1.) Since
8 that time, PersonalWeb has also agreed that Amazon may move for a supplemental award of
9 attorney fees, further confirming that the state court injunction does not bar the ongoing
10 proceedings before this Court. (Dkts. 711, 715.) PersonalWeb has thus waived any claim that the
11 state court proceeding precludes post-judgment enforcement or excuses it from complying with this
12 Court's orders. *Richmark*, 959 F.3d at 1473; *Davis*, 650 F.2d at 1160.

13 ***The preliminary injunction does not apply to this action.*** This Court retains post-judgment
14 enforcement jurisdiction because the preliminary injunction carves out this proceeding.
15 Specifically, clause (b) prohibits another entity from “[c]ommencing, prosecuting, continuing, or
16 entering into any suit or proceeding in the name or on behalf of Defendant PersonalWeb, or any of
17 their subsidiaries or affiliates, *except for any pending enforcement actions by Defendant*
18 *PersonalWeb concerning its intellectual property claims.*” (Gregorian Decl., Ex. 5 [Preliminary
19 Injunction Order] at 4 (emphasis added).) PersonalWeb initiated this action involving intellectual
20 property claims against Amazon's customers and the preliminary injunction therefore does not
21 purport to enjoin proceedings in this Court.

22 ***This Court retains jurisdiction under the Abstention Doctrine.*** This Court also retains
23 post-judgment enforcement jurisdiction under the abstention doctrine outlined in *Colorado River*
24 *Water Conservation District v. United States*, 424 U.S. 800 (1976). In the Ninth Circuit, eight
25 factors are considered in determining the appropriateness of a dismissal or stay of a federal court
26 action in favor of a parallel court action under *Colorado River*:

- 27 (1) which court first assumed jurisdiction over any property at stake;
28 (2) the inconvenience of the federal forum; (3) the desire to avoid
piecemeal litigation; (4) the order in which the forums obtained

jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

R.R. Street & Co. v. Transport Ins. Co., 656 F.3d 966, 978-79 (9th Cir. 2011). As noted in the eighth factor above, “[i]n this Circuit, the narrow *Colorado River* doctrine requires that the pending state court proceeding resolve all issues in the federal suit.” *Holder v. Holder*, 305 F.3d 854, 859 (9th Cir. 2002); *see also Seneca Ins. Co. v. Strange Land, Inc.*, 862 F.3d 835, 842 (9th Cir. 2017). Indeed, if “there exists a substantial doubt as to whether the state court proceedings will resolve all of the disputed issues in [the federal] case, it is unnecessary for [the court] to weigh the other factors included in the *Colorado River* analysis.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 n.7 (9th Cir. 1993). Here, this dispositive requirement is not met because the issue of satisfaction of this Court’s judgment and award of attorney fees will not be resolved by a receivership action between PersonalWeb and Insiders. Indeed, the California state court has denied Amazon’s motion for leave to intervene in the receivership action, thus, preventing Amazon from obtaining relief in that proceeding. (Gregorian Decl., Ex. 10 [Order Denying Motion to Intervene].)

Just as important, there is no conflict whatsoever between the Court’s current discovery orders and the state court receivership. It is unclear whether the receiver has even taken possession of the records the Court ordered PersonalWeb to produce. (If it has, it occurred *after* the Court’s discovery orders when PersonalWeb and Stubbs Alderton both knew perfectly well that they should retain copies and produce them.) Regardless, producing electronic copies of the records does not interfere in any way with the receiver’s management of PersonalWeb’s estate.

REQUEST FOR CASE MANAGEMENT CONFERENCE

Amazon requests that the Court schedule a case management conference as soon as practicable to clarify whether the California state court has deprived this Court of jurisdiction or excused PersonalWeb from complying with the Court's discovery orders, particularly those that issued without PersonalWeb raising any objection based on the state court action or receivership.

Respectfully submitted,

Dated: January 7, 2022

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